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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Maria Laura Martinez,

10 Plaintiff,

11 v.

12 Cenlar FSB,

13 Defendant.  
14

No. CV-13-00589-TUC-CKJ

**ORDER**

15 Pending before the Court are two Motions. On March 3, 2014, Defendant filed a  
16 Motion for Judgment on the Pleadings. (Doc. 35). Then, on March 14, 2014, Plaintiff  
17 filed a Motion for Leave to Amend Complaint. (Doc. 39).

18 The Court reviewed the parties' pleadings and heard oral argument on August 25,  
19 2014. The Court will grant the Motion for Judgment on the Pleadings in part and deny it  
20 in part and will grant the Motion for Leave to Amend the Complaint.

21 **I. Background<sup>1</sup>**

22 **A. Facts**

23 Plaintiff purchased a house in Tucson, Arizona on March 7, 2008. (Doc. 11 at ¶7).  
24 In the spring of 2010, Plaintiff lost her job and began experiencing financial difficulties.  
25 (*Id.* at ¶8). On August 9, 2010, Plaintiff received a Notice of Trustee Sale. *Id.* at ¶9.  
26 After negotiating with her lender, MeriWest Credit Union, the Trustee Sale was cancelled  
27 and her mortgage payments were temporarily reduced. *Id.* However, one year later in  
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<sup>1</sup> Unless otherwise noted, the facts come from the Plaintiff's Complaint.

1 August 2011, the temporary modification of her mortgage payments expired and her  
2 payment was increased. *Id.* at ¶10.

3 Plaintiff made the first two mortgage payments after the expiration of the  
4 temporary loan modification; however, she was unable to continue making payments. *Id.*  
5 at ¶11. On August 26, 2011, Defendant, Plaintiff's loan servicer, signed a contract with  
6 the Arizona Department of Housing, which is responsible for running the Arizona  
7 Hardest Hit Fund ("HHF") program. *Id.* at ¶14. The contract provides that "[u]pon  
8 notification that a borrower has been conditionally approved for HHF, the Servicer shall  
9 not initiate the foreclosure process or, if the borrower is already in the foreclosure  
10 process, [shall delay] a foreclosure sale for 45 days, with any extensions by mutual  
11 consent of the Eligible Entity and the Servicer." *Id.* at ¶15.

12 In April 2012, Plaintiff received a foreclosure notice. *Id.* at ¶12. In response,  
13 Plaintiff applied for the HHF program for assistance with her mortgage. *Id.* She was  
14 approved for Underemployment Assistance through the HHF, which provides a  
15 maximum monthly assistance of \$2,000 for a term of 24 months. *Id.* at ¶13. On June 26,  
16 2012, Defendant received an "I" record from the Arizona Department of Housing  
17 indicating their intent to provide payment assistance to Plaintiff through the HHF  
18 program. *Id.* at ¶¶16, 19.

19 On July 3, 2012, Plaintiff's house was sold at an auction without Plaintiff's  
20 knowledge. *Id.* at ¶21. On July 6, 2012, Defendant sent an objection to the Arizona  
21 Department of Housing regarding Plaintiff's HHF assistance because the house had been  
22 foreclosed on July 3, 2012. *Id.* at ¶22. The sale of Plaintiff's house was irreversible, and  
23 Plaintiff was forced to vacate her home in July 2012. *Id.* at ¶¶23, 26.

#### 24 **B. Procedural History**

25 On July 3, 2013, Plaintiff filed a Complaint. (Doc. 1). On July 25, 2013,  
26 Defendant filed a Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P.  
27 12(b)(6). (Doc. 7). On August 14, 2013, Plaintiff filed a First Amended Complaint, (Doc.  
28 11), which superseded her original Complaint. *See F.D.I.C. v. Jackson*, 133 F.3d 694,

702 (9th Cir. 1998). After the filing of Plaintiff's First Amended Complaint, the Court denied Defendant's Motion to Dismiss as moot. (Doc. 18). Defendant filed an Answer to Plaintiff's First Amended Complaint on September 3, 2013. (Doc. 16).

In her First Amended Complaint, Plaintiff alleges four claims for relief: breach of contract, wrongful foreclosure, breach of the covenant of good faith and fair dealing, and negligent performance of an undertaking. On March 3, 2014, Defendant filed a Motion for Judgment on the Pleadings. (Doc. 35). Then, on March 14, 2014, Plaintiff filed a Motion for Leave to Amend Complaint. (Doc. 39). Defendant filed a Response to Plaintiff's Motion on March 28, 2014. (Doc. 40). Plaintiff filed a Response to Defendant's Motion on April 1, 2014. (Doc. 41). Defendant filed a Reply in support of its Motion for Judgment on the Pleadings on April 8, 2014. (Doc. 44). Plaintiff filed a Reply in support of her Motion for Leave to Amend Complaint on April 9, 2014. (Doc. 46).

## **II. Motion for Judgment on the Pleadings**

### **A. Governing Standard**

Fed.R.Civ.P. 12(c) provides that, "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Dismissal through a motion for judgment on the pleadings is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir.1988) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)). Judgment on the pleadings is appropriate when the moving party establishes that there are no material issues of fact to resolve and it is entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir.1989). "All allegations of fact of the opposing party are accepted as true." *Austad v. United States*, 386 F.2d 147, 149 (1967). Furthermore, all inferences reasonably drawn from the alleged facts must be construed in favor of the responding party. *General Conference Corp. of Seventh-Day Adventists v. Seventh Day Adventist Congregational*

1 *Church*, 887 F.2d 228, 230 (9th Cir.1989). However, conclusory allegations are  
2 insufficient to defeat a motion for judgment on the pleadings. *McGlinchy*, 845 F.2d at  
3 810.

4 The Court may consider any matter set forth in the complaint which is subject to  
5 judicial notice. *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 896, 899 (9th  
6 Cir.2007). The Court may take judicial notice of “matters of public record” outside the  
7 pleadings without converting a motion for judgment on the pleadings into a motion for  
8 summary judgment. Fed.R.Evid. 201; *see also Lexicon Inc. v. Milberg Weiss Bershad*  
9 *Hynes & Lerach*, 102 F.3d 1524, 1537 (9th Cir.1996), *rev'd on other grounds*, 523 U.S.  
10 26 (1998) (holding that a district court may consider matters of public record, including  
11 court records that have a direct relation to the matters at issue, without converting a  
12 motion to dismiss into a motion for summary judgment); *Mann v. GTCR Golder Rauner,*  
13 *L.L.C.*, 351 B.R. 714 (D.Ariz.2006) (same). The Court also may consider a document that  
14 is attached and referred to in the complaint without converting the motion into a motion  
15 for summary judgment if its authenticity is not questioned. *Branch v. Tunnell*, 14 F.3d  
16 449, 453-454 (9th Cir.1994), *overruled on other grounds*, *Galbraith v. County of Santa*  
17 *Clara*, 307 F.3d 1119 (9th Cir. 2002).

## 18 **B. Discussion**

### 19 **1. Breach of Contract**

20 Defendant entered into a Servicer Participation Agreement (Agreement) with the  
21 Arizona Department of Housing on August 26, 2011, in which Defendant agreed to  
22 participate in the HHF program. (Doc. 11 at ¶31). The purpose of the HHF program is to  
23 assist unemployed homeowners to keep their homes by providing monetary assistance.  
24 (*Id.* at ¶¶32, 33.) According to Plaintiff, Defendant breached the Agreement when it  
25 failed to delay the foreclosure proceedings in accordance with the terms of the  
26 Agreement despite receiving prior notice that Plaintiff had been approved for assistance  
27 through the HHF program. *Id.* at ¶51.

28 Defendant argues that Plaintiff does not have standing to bring a breach-of-

1 contract claim against Defendant for allegedly breaching its Agreement with the Arizona  
2 Department of Housing. Defendant explains that the HHF program was created under the  
3 Making Home Affordable Act, which was an Act created under the Emergency  
4 Economic Stabilization Act (EESA). *See* 12 U.S.C. §§5201-5261. Since the HHF is a  
5 program created under the EESA, there is no private right of action upon which Plaintiff  
6 can base her breach of contract claim and it should be dismissed. *See Miller v. Chase*  
7 *Home Finance, LLC*, 677 F.3d 1113, 1116-1117 (11th Cir. 2012).

8 Plaintiff admits that there is no express private right of action embodied in the  
9 Economic Emergency Stabilization Act or the Home Affordable Modification Program  
10 (HAMP). (Doc. 41 at 6.) *See Marks v. Bank of America, N.A.*, 2010 WL 2572988, \*5-6  
11 (D. Ariz. 2010) (the district court held that the mortgagor had no private right of action  
12 under HAMP).

13 However, Plaintiff argues that because she was approved for assistance through  
14 the HHF program and Defendant was so notified, and specific identifying information  
15 was provided to Defendant about Plaintiff, she was an intended third-party beneficiary to  
16 the Agreement between Defendant and the Arizona Department of Housing, which  
17 provided that upon receipt of notification of conditional approval, Defendant would not  
18 commence foreclosure proceedings for 45 days or if already in the foreclosure process  
19 would not conduct a sale for 45 days. Specifically, the Agreement provides:

20           Upon notification that a borrower has been conditionally  
21           approved for HHF, the Servicer shall not initiate the  
22           foreclosure process or, if the borrower is already in the  
23           foreclosure process, conduct a foreclosure sale for 45 days,  
              with any extensions by mutual consent of the Eligible Entity  
              and the Servicer. (Doc. 11-1 at ¶3)

24 Plaintiff is not a party to the Agreement between Defendant and the Arizona  
25 Department of Housing. Therefore, to have standing to sue for breach of this Agreement,  
26 Plaintiff must be an intended third-party beneficiary to the contract as opposed to an  
27 incidental beneficiary. *GECCMC 2005-C1 Plummer Street Office Ltd. Partnership v.*  
28 *JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012); *Klamath Water*

1 *Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000). The Ninth Circuit  
2 defines third party beneficiaries as:

3 (1) Unless otherwise agreed between promisor and promisee,  
4 a beneficiary of a promise is an intended beneficiary if  
5 recognition of a right to performance in the beneficiary is  
6 appropriate to effectuate the intention of the parties and ... (b)  
7 the circumstances indicate that the promisee intends to give  
8 the beneficiary the benefit of the promised performance.

9 (2) An incidental beneficiary is a beneficiary who is not an  
10 intended beneficiary.

11 *Klamath*, 204 F.3d at 1211(citing the Restatement (Second) of Contracts § 302 (1979)).  
12 “To sue as a third-party beneficiary of a contract, the third party must show that the  
13 contract reflects the express or implied intention of the parties to the contract to benefit  
14 the third party.” *Klamath*, 204 F.3d at 1211. The mere fact that a third party may benefit  
15 under the contract does not confer a right to sue, “instead, the parties must have intended  
16 to benefit the third party.” *Id.* “[T]o prove intended beneficiary status, ‘the third party  
17 must show that the contract reflects the express or implied intention of the parties to the  
18 contract to benefit the third party.’” *GECCMC 2005-C1 Plummer Street Office Ltd.*  
19 *Partnership*, 671 F.3d at 1033 (quoting *Klamath Water Users Prof. Assoc.*, 204 F.3d at  
20 1211.)

21 While the contract does not have to specifically name the third party and can  
22 specify a class of parties to benefit from the contract, “‘parties that benefit from a  
23 government contract are generally assumed to be incidental beneficiaries,’ rather than  
24 intended beneficiaries, and so ‘may not enforce the contract absent a clear intent to the  
25 contrary.’” *GECCMC 2005-C1 Plummer Street Office Ltd. Partnership*, 671 F.3d at  
26 1033 (quoting *Cnty. of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244 (9th Cir.  
27 2009), *rev’d on other grounds by Astra USA, Inc. v. Santa Clara Cnty.*, 131 S.Ct. 1342,  
28 (2011)).

This clear intent hurdle is a high one. It is not satisfied by a  
contract's recitation of interested constituencies, vague,  
hortatory pronouncements, statements of purpose, explicit  
reference to a third party, or even a showing that the contract  
operates to the third parties' benefit and was entered into with

1           them in mind, Rather, we examine the precise language of the  
2           contract for a clear intent to rebut the presumption that the  
3           third parties are merely incidental beneficiaries.

4           *GECCMC 2005-C1 Plummer Street Office Ltd. Partnership*, 671 F.3d 1027, 1033-1034  
5           (9th Cir. 2012) (internal quotations and citations omitted). “One way to ascertain such  
6           intent is to ask whether the beneficiary would be reasonable in relying on the promise as  
7           manifesting an intention to confer a right on him or her.” *Klamath*, 204 F.3d at  
8           1211 (citing Restatement (Second) of Contracts § 302(1)(b) cmt. d). In *Marks*, the  
9           district court found that the plaintiff mortgagor was not an intended beneficiary because  
10          the language of the contract did not show that the parties to the contract intended to grant  
11          qualified borrowers the right to enforce and that the lender was not required to grant or  
12          deny the loan, only to consider it, so the plaintiff mortgagor could not have reasonably  
13          believed that the defendant lender was obligated to modify her loan. 2010 WL 2572988,  
14          at \*4.

15          In the present case, Plaintiff argues that because Defendant had a duty under the  
16          Agreement to postpone any foreclosure proceeding upon notification that a borrower had  
17          been approved for HHF funding and because the “I” record sent to Defendant by the  
18          Arizona Department of Housing specifically identified Plaintiff as the person who would  
19          receive payment assistance, the parties manifested a clear intent to confer on Plaintiff  
20          status as a third-party beneficiary of the Agreements. Further, Plaintiff argues that she  
21          reasonably relied on Defendant’s promise in the Agreement to postpone the trustee sale  
22          of her home upon preliminary approval for HHF funding. Defendant asserted at oral  
23          argument that there was no proof it had ever received the “I” record.<sup>2</sup>

24          The majority of the cases found by this Court that address third-party beneficiary  
25          claims related to contracts or agreements concerning programs created under the EESA  
26          or HAMP deal with a borrower attempting to enforce compliance with the terms of  
27          HAMP Service Provider Agreements. *See Edwards v. Aurora Loan Services, LLC*, 791

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28          <sup>2</sup> As the Court noted at oral argument, this motion is one for judgment on the  
pleadings and such an argument is better left to a motion for summary judgment.



1 F.Supp.2d 144, 152 (D. DC. 2011) (listing cases in which district courts have addressed  
2 the question of whether eligible borrowers have standing to enforce the terms of HAMP  
3 Service Provider Agreements as third party beneficiaries and decided against the  
4 borrowers); *Marks v. Bank of America, N.A.*, 2010 WL 2572988 (D. Ariz. 2010). The  
5 central theme in the reasoning of these opinions is that the HAMP contracts do not  
6 contain any provisions demonstrating the parties' intent to make eligible borrowers third-  
7 party beneficiaries with enforceable rights and the HAMP contracts provided the lenders  
8 with significant discretion on whether to modify borrower's loans. This case is  
9 distinguishable, and Defendant has not presented any cases that address the specific  
10 situation applicable in this case.

11 This is a close question. On the one hand, the language of the contract contains  
12 nothing specifically identifying borrowers as intended beneficiaries. But it also contains  
13 no language limiting the benefits of the Agreement to the parties to the Agreement.  
14 *Compare Escobedo v. Country Wide Home Loans, Inc.*, 2009 WL 4981618, at \*2  
15 (S.D.Cal. Dec. 15, 2009) (the Agreement specified that it "shall inure to the benefit of . . .  
16 the parties to the Agreement and their permitted successors-in-interest."). The  
17 Agreement here does, however, contain the clause requiring the lender to defer or delay  
18 any foreclosure proceedings upon receipt of a notification that a borrower has been  
19 conditionally approved for HHF. The Court finds that this clearly expresses an intent to  
20 benefit those borrowers for whom the lender receives notification of conditional approval  
21 for HHF. (*See* Doc. 11-1, ¶3). Unlike the other HAMP cases in which the lender was  
22 under no obligation to modify the borrower's loan, in this case, there was an express  
23 clause requiring the Defendant to delay the foreclosure sale at least 45 days. The  
24 Agreement provides no discretion to the Defendant regarding delay of foreclosure action  
25 45 days after receiving notice that a borrower had been conditionally approved for HHF  
26 funding. Plaintiff—a borrower who received conditional approval for HHF and on  
27 whose behalf a notice was sent to Defendant prior to the foreclosure sale—is within the  
28 class of persons that is an intended beneficiary of the Agreement.



1 Based on the facts of this case and the particular Agreement at issue, the Court  
2 finds that Plaintiff has stated a plausible claim for breach of contract for failing to delay  
3 the foreclosure process 45 days after receiving notice that Plaintiff had been approved for  
4 HHF funding.

5 Further, the Court does not believe that a finding that Plaintiff has standing in this  
6 case would open the door to potentially millions of homeowners filing claims and notes  
7 that at oral argument, Defendant did not claim to have information of such an opening of  
8 the “floodgates.” The Court’s holding is limited to the specific language used in this  
9 Agreement and to those borrowers on whose behalf a lender received notice of  
10 conditional approval for HHF funding but after receiving such notice, the lender failed to  
11 delay a foreclosure sale for at least 45 days as required by the relevant contract.

## 12 **2. Wrongful Foreclosure**

13 Defendant argues that Plaintiff’s wrongful foreclosure claim should be dismissed  
14 because it is based on Plaintiff’s breach-of-contract claim. However, this Court has  
15 determined that Plaintiff has stated a valid breach of contract claim, so the argument is  
16 precluded.

17 Alternatively, Defendant argues that Plaintiff has failed to sufficiently plead a  
18 claim for wrongful foreclosure. Arizona state courts do not recognize the tort of  
19 wrongful foreclosure. *Adrian v. Federal Nat. Mortg. Ass’n*, 557 Fed. Appx. 652, 653-  
20 654 (9th Cir. 2014). However, district courts in Arizona have followed the reasoning of  
21 other jurisdictions that do recognize the tort of wrongful foreclosure. *See Cervantes v.*  
22 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011). A wrongful  
23 foreclosure claim is available only after a foreclosure had occurred and where the  
24 plaintiff is not in default at the time of the foreclosure. *Cervantes v. Countrywide Home*  
25 *Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011); *Holt v. Countrywide Home Loans, Inc.*,  
26 2012 WL 369591, \*4 (D. Ariz. 2012) (“[t]o establish a claim for wrongful foreclosure  
27 Plaintiffs must prove that either they were not in default at the time of the foreclosure or  
28 that the foreclosing party caused their default.”).

1 Plaintiff argues that although she was in default on the loan, the default was cured  
2 when she was approved for HHF funding. (Doc. 41 at 10.) Specifically, Plaintiff  
3 contends that once the “I” record was sent to Defendant, any default on the loan was  
4 cured and Defendant was no longer authorized to proceed with the foreclosure. (*Id.* at  
5 10-11.) Plaintiff relies on the reasoning of *Herring v. Countrywide Home Loans, Inc.*,  
6 2007 WL 2051394, \*5-6 (D. Ariz. 2007). In *Herring*, the district court found that  
7 because the plaintiff had cured any default on the home loan when she entered into a  
8 Repayment Plan Agreement with the defendant and paid the initial payment, a  
9 subsequent foreclosure of plaintiff’s home was wrongful. *Id.* at \*1, 6. The Court finds  
10 that the reasoning in *Herring* is distinguishable from this case.

11 According to Plaintiff’s First Amended Complaint, Defendant received the “I”  
12 record on June 26, 2012. However, according to Plaintiff, this notification only provided  
13 notice that Plaintiff was conditionally approved for HHF funding and is meant to initiate  
14 the approval process. (Doc. 11-2). Once the “I” record was received, Defendant was not  
15 necessarily obligated to accept the funding and could file an “O” record objecting to the  
16 application. As such, until the Defendant validated that the approval had been processed  
17 by issuing a “V” record, the default had not been cured. In fact, according to the  
18 Complaint, on July 6, 2012, three days after the foreclosure sale, Defendant sent an “O”  
19 record to the HHF regarding Plaintiff’s application.

20 Additionally, Plaintiff’s First Amended Complaint does not even allege that the  
21 “I” record cured any breach. In fact, it specifically provides that Plaintiff “was in a  
22 position to tender the required funds to cure any breach.” (Doc. 11 at ¶20).

23 Accordingly, Plaintiff’s claim for wrongful foreclosure is dismissed without  
24 prejudice.

### 25 3. Covenant of Good Faith and Fair Dealing

26 Defendant argues that Plaintiff’s bad faith claim should be dismissed since it is  
27 based on Plaintiff’s breach-of-contract claim. Again, because this Court has determined  
28 that Plaintiff has stated a valid breach-of-contract claim, the Court rejects this argument.

1           The implied covenant of good faith and fair dealing protects the right of the parties  
 2 to a contract to receive the benefits of the contract they entered into. *Wagenseller v.*  
 3 *Scottsdale Memorial Hosp.*, 147 Ariz. 370, 385 (1985). This implied covenant prevents  
 4 either party from acting “to impair the right of the other [to] receive the benefits which  
 5 flow from their agreement.” *Rawlings v. Apodaca*, 151 Ariz. 149, 153 153, 726 P.2d 565  
 6 569. As an intended third-party beneficiary of the Agreement, Plaintiff may be permitted  
 7 to rely on the Agreement to pursue a claim for a breach of the covenant of good faith and  
 8 fair dealing based in contract.<sup>3</sup> See e.g. *Schwartz v. Chase Home Finance, LLC*, 2011  
 9 WL 1933738, \*2 (D. Ariz. 2011).

10           “While the remedy for breach of this implied covenant is ordinarily by action on  
 11 contract, in certain circumstances ‘the breach . . . may provide the basis for imposing tort  
 12 damages.’” *McAlister v. Citibank (Arizona), a Subsidiary of Citicorp*, 171 Ariz. 207, 213,  
 13 829 P.2d 1253, 1259 (Ariz. Ct. App. 1992) (quoting *Burkons v. Ticor Title Ins. Co. of*  
 14 *Cal.*, 168 Ariz. 345, 355, 813 P.2d 710, 720 (1991)). However, in order to support a  
 15 tortious breach of this covenant, a special relationship characterized either by a fiduciary  
 16 relationship, elements of public interest, or adhesion must exist. *McAlister*, 171 Ariz. at  
 17 213, 829 P.2d at 1259.

18           As noted, in her opposition to the Motion, Plaintiff argues a tortious breach of the  
 19 covenant of good faith and fair dealing when Defendant proceeded with the foreclosure  
 20 sale after receiving the “I” record. She contends that lenders and loan servicers have a  
 21 non-contractual duty towards borrowers that can give rise to negligence claims. (Doc. 41  
 22 at 12, citing *McIntosh v. IndyMac Bank, FSB*, 2012 WL 176316 at \*3-4 (D. Ariz. 2012)).

23           Defendant argues that according to these cases, a special relationship sufficient to  
 24 support a negligence claim between a borrower and loan servicer is limited to a duty to  
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26           <sup>3</sup>Plaintiff’s First Amended Complaint alleges a breach of the covenant of good  
 27 faith and fair dealing based on the contractual relationship between the parties, but in her  
 28 Response to Defendant’s Motion, Plaintiff alleges that this is based in tort. (See Doc. 11  
 ¶¶ 67-68, 70, 72; Doc. 41 at 12 (referring to non-contractual duty).) At oral argument,  
 she stated that the claim is in tort. The Court notes that the proposed Second Amended  
 Complaint appears to identify the claim as one in contract. (Doc. 39, Ex. A ¶¶78-79.)

1 disclose. See *McIntosh v. IndyMac Bank, FSB*, 2012 WL 176316, \*3 (D. Ariz. 2012);  
2 *Narramore v. HSBC Bank USA, N.A.*, 2010 WL 2732815, \*8 (D. Ariz. 2010) (citing  
3 *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 803 P.2d 900 (Ct.App. Div.1. 1990)).

4 Plaintiff has not alleged that Defendant disclosed incorrect information to Plaintiff  
5 nor has Plaintiff alleged any relationship with Defendant other than traditional borrower  
6 and loan servicer. But the district court in *McIntosh* also stated that “it is not apparent to  
7 the Court why [the bank] would not have a duty to correctly service [the] [p]laintiff’s  
8 account” and that if it the bank’s failure to correctly service the account resulted in  
9 foreclosure, then that states a cause of action in negligence. 2012 WL 176316 at \*3.  
10 This Court agrees with *McIntosh* that negligent servicing of the account can state a cause  
11 of action.

12 Defendant also replies that the economic-loss doctrine bars any tort claims based  
13 out of the contractual relationship between Plaintiff and Defendant that are not  
14 accompanied by physical harm. (Doc. 44 at 3.)

15 “While some courts have stated that the economic loss doctrine ‘bars a party from  
16 recovering economic damages in tort unless accompanied by physical harm,’” this  
17 definition is overly broad. *Flagstaff Affordable Housing Ltd. Partnership v. Design*  
18 *Alliance, Inc.*, 223 Ariz. 320, 323, 223 P.3d. 664, 667 (Ariz. 2010) (quoting *Carstens v.*  
19 *City of Phoenix*, 206 Ariz. 123, 125, 75 P.3d 1081, 1083 (Ariz. Ct. App. 2003). The  
20 economic-loss doctrine limits “a contracting party to contractual remedies for the  
21 recovery of economic losses unaccompanied by physical injury to persons or property.”  
22 *Design Alliance, Inc.*, 223 Ariz. at 323, 223 P.3d. at 667.

23 As a general rule, where contract law has no mechanism to protect the wronged  
24 party, the economic-loss doctrine will not act to bar the claim. *Ares Funding, L.L.C. v.*  
25 *MA Maricopa, L.L.C.*, 602 F.Supp.2d 1144, 1149 (D.Ariz. 2009). When a duty arises at  
26 law, not by contract, the economic-loss rule should not act as a bar to recovery.  
27 *Narramore*, 2010 WL 2732815, \*6 (citing *Giles v. General Motors Acceptance Corp.*,  
28 494 F.3d 865, 880 (9th Cir. 2007)).

1 In sum, in this case, if contract law provides a mechanism to protect Plaintiff as an  
2 intended third-party beneficiary to a contract from a wrong based on the contract and  
3 Plaintiff has failed to allege any physical injury, Plaintiff's claim for a tortious breach of  
4 the covenant of good faith and fair dealing in this case is barred by the economic-loss  
5 rule. *See Ares Funding, LLC v. MA Maricopa, LLC*, 602 F.Supp.2d. 1144, 1148-1149  
6 (D. Ariz. 2009). Alternatively, if there is no contract claim, the Court finds that Plaintiff  
7 has stated a claim in tort.

8 The Court will deny the Motion for Judgment on the Pleadings on this claim.

#### 9 **4. Negligent Performance of an Undertaking**

10 Plaintiff argues that her claim for negligent performance of an undertaking is  
11 permitted under Arizona law with respect to a servicer of a loan who offers to participate  
12 in assisting a homeowner in a loan modification. Plaintiff argues that Defendant  
13 negligently administered Plaintiff's HHF application and mortgage when it failed to  
14 delay the trustee sale after receiving notification that Plaintiff had been approved to  
15 receive HHF assistance.

16 Arizona follows the Restatement (Second) of Torts in relation to the tort of  
17 negligent performance of an undertaking. *Steinberger v. McVey ex rel. County of*  
18 *Maricopa*, 234 Ariz. 125, 318 P.3d. 419, 430-431 (Ariz. Ct. App. 2014). The  
19 "'Good Samaritan' doctrine allows recovery from those who undertake 'to render  
20 services to another which he should recognize as necessary for the protection of the  
21 other's person or things' but fail to exercise reasonable care in the performance of the  
22 undertaking." *Bergdale v. Countrywide Bank FSB*, 2013 WL 105295, \*7 (D. Ariz. 2013).  
23 Pursuant to Restatement §323, "a party may assume the duty to act with reasonable care  
24 even though it otherwise had no duty to do so." *Steinberger*, 234 Ariz. 125, 318 P.3d at  
25 431.

26 Under this 'Good Samaritan Doctrine,' a party may be liable for negligent  
27 performance of an assumed duty by either: (1) increasing the risk of harm to another, or  
28 (2) causing another to suffer harm because he or she relied on the party exercising

1 reasonable care in undertaking the duty.” *Steinberger*, 234 Ariz. 125, 318 P.3d. at 431.  
 2 The Good Samaritan Doctrine is applicable to physical harm and economic harm. *Id.*

3 The *Steinberger* court held that to state a claim for increased risk of economic  
 4 harm, the plaintiff must allege the following elements: (1) defendants undertook to render  
 5 services to the plaintiff that they should have recognized were necessary for the  
 6 protection of the plaintiff’s property, (2) the defendants’ failure to exercise reasonable  
 7 care while doing so increased the risk of harm to the plaintiff, and (3) the plaintiff was in  
 8 fact harmed because of the defendants’ actions. *Id.* at 431 (citing Restatement (Second)  
 9 of Torts § 323).

10 Defendant argues in its reply that Plaintiff fails to fully state the standard for such  
 11 a claim, citing *Steinberger*, where the Arizona Court of Appeals wrote that:

12 a lender may be held liable under the Good Samaritan  
 13 Doctrine when: (1) a lender, or its agent/representative,  
 14 induces a borrower to default on his or her loan by promising  
 15 a loan modification if he or she defaults; (2) the borrower, in  
 16 reliance on the promise to modify the loan, subsequently  
 17 defaults on the loan; (3) after the borrower defaults, the lender  
 or its agent/representative negligently processes or fails to  
 process the loan modification, or due to the  
 lender/agent/representative’s negligence, the borrower is not  
 granted a loan modification; and (4) based on the default, the  
 lender subsequently forecloses on the borrower’s property.

18 *Id.* at 432. Defendant contends that Plaintiff has failed to allege that Defendant induced  
 19 Plaintiff to default on her loan and as such, her claim for negligent performance of an  
 20 undertaking fails. However, the court in *Steinberger*, specifically explained that its  
 21 holding was limited to the particular allegations in that case. *Id.* Defendant has not  
 22 presented any cases demonstrating that a lender is excepted from the Good Samaritan  
 23 Doctrine in situations where the lender does not explicitly induce a borrower to default on  
 24 a loan. *See Silving v. Wells Fargo Bank, NA*, 800 F.Supp.2d 1055, 1073 (D. Ariz. 2011).  
 25 Moreover, subsequent to the *Steinberger* case, at least one federal district court has said  
 26 that *Steinberger* holds that the Good Samaritan doctrine permits a homeowner “to sue the  
 27 bank if through the modification process: ‘(1) [the bank] undertook to render services to  
 28 [plaintiff] that [it] should have recognized were necessary for the protection of

1 [plaintiff's] property, (2) [the bank's] failure to exercise reasonable care while doing so  
 2 increased the risk of harm to [plaintiff], and (3) [plaintiff] was in fact harmed because of  
 3 [the bank's] actions.” *Quintana v. Bank of America*, 2014 WL 690906, at \*6 n.5 (D.  
 4 Ariz. Feb. 24, 2014), citing *Steinberger*, 2014 WL 333575, \*9.

5 Plaintiff's First Amended Complaint alleges that as a result of Defendant's  
 6 negligent processing of the HHF application in failing to delay the foreclosure proceeding  
 7 45 days in accordance with the Agreement and Plaintiff suffered economic harm in the  
 8 form of loss of equity and the loss of her family home. The Court finds that Plaintiff has  
 9 sufficiently alleged a cognizable claim for negligent performance of an undertaking.

### 10 **III. Motion to Amend the Complaint**

#### 11 **A. Governing Standard**

12 Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that unless an  
 13 amendment is as of right pursuant to Rule 15(a)(1), a party may amend its pleading only  
 14 with the opposing party's consent or the court's permission. Fed. R. Civ. P. 15. Leave to  
 15 amend is to be freely granted. Fed. R. Civ. P. 15(a)(2).

#### 16 **B. Discussion**

17 The Court will grant the Motion.

18 On February 14, 2014, the parties filed a Stipulation to Extend the Time to Amend  
 19 the Pleadings; the Court granted the Stipulation, extending the time to join additional  
 20 parties or amend the pleadings to March 14, 2014. (Doc. 31.) Plaintiff filed her Motion  
 21 to Amend with the attached proposed Second Amended Complaint on March 14, 2014.  
 22 (Doc. 39.)

23 Defendant opposes the motion, arguing that it is made in bad faith and will result  
 24 in undue prejudice. (Doc. 41 at 1.) It asserts that Plaintiff has failed to cure deficiencies  
 25 by amendments previously allowed. (*Id.* at 2.) Defendant also argues that it is a proper  
 26 exercise of the Court's discretion to deny a motion to amend “when the amendment  
 27 comes late and raises new issues requiring preparation for factual discovery which would  
 28 not otherwise have been necessitated nor expected, thus requiring delay in the decision of



1 the case.’” (*Id.*) Defendant points out that the Court-ordered deadline for discovery is  
2 April 30, 2014. (*Id.*; ref. Doc. 34.) The proposed Second Amended Complaint raises  
3 new issues; specifically, Plaintiff seeks to add causes of action for Tortious Interference  
4 with Business Expectancy and Fraud. Defendant asserts that these fraud-based causes of  
5 action require significant additional discovery. (Doc. 40 at 3.)

6 Plaintiff replies that there was no undue delay in seeking to amend the complaint  
7 by adding three new claims, which arise from newly discovered evidence (fraud,  
8 negligent misrepresentation, tortious interference with a business expectancy). (Doc. 46  
9 at 2.) She asserts that the basis for these claims was learned through discovery and after  
10 the filing of the First Amended Complaint on August 14, 2014. Specifically, before  
11 discovery, Plaintiff believed, based on assertions by Defendant to the Department of  
12 Housing, that her home had been sold to a bona fide third-party purchaser on July 6,  
13 2012, and so the sale was irreversible. At the deposition of Defendant’s Rule 30(b)(6)  
14 witness on February 24, 2014, Plaintiff discovered that the property was, in fact, not sold  
15 to a bona fide purchaser, but to Fannie Mae and remained in Defendant’s Real Estate  
16 Owned Division until October 25, 2012. Plaintiff asserts that if she had possessed  
17 truthful information about the sale, it could have been reversed. (*Id.*)

18 Plaintiff argues that the Court should reject Defendant’s objection to adding  
19 claims based on Defendant’s conduct that was discovered only through a deposition, and  
20 she notes that the Motion for Leave to Amend was filed within the timelines stipulated by  
21 the parties. She also argues that the parties have stipulated to extend the discovery  
22 schedule. (Doc. 45.)

23 The Court finds that the claims raised in the proposed Second Amended  
24 Complaint are not frivolous and that there was no undue delay in raising the new claims.

25 **IT IS ORDERED:**

26 (1) Defendant’s Motion for Judgment on the Pleadings (Doc. 35) is **granted in**  
27 **part and denied** in part as follows:

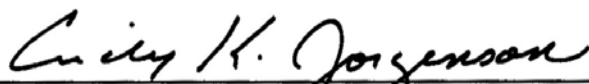
28 (a) **granted** as to the claim for wrongful foreclosure; and

1 (b) **denied** in all other respects.

2 (2) Plaintiff's Motion for Leave to Amend the Complaint (Doc. 39) is **granted**.

3 (3) Plaintiff must file the Second Amended Complaint within 14 days of the  
4 filing of this Order.

5 Dated this 3rd day of September, 2014.

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10 Cindy K. Jorgenson  
11 United States District Judge  
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